No. 24A653

IN THE

Supreme Court of the United States

MERRICK GARLAND, ATTORNEY GENERAL, ET AL.,

Applicants,

v.

TEXAS TOP COP SHOP, INCORPORATED, ET AL.

On Application for a Stay of the Injunction Issued by the United States District Court for the Eastern District of Texas

BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN OPPOSITION TO THE APPLICATION

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") was founded in 1981 by Phyllis Schlafly, and for more than two decades has filed many appellate *amicus* briefs in federal and state courts. Eagle Forum ELDF has long advocated against power grabs by the federal government at the expense of individual rights, and in support of the sovereign authority of states. For example, Eagle Forum ELDF as represented by Phyllis Schlafly filed an *amicus* brief in the landmark case of *United States v. Morrison*, 529 U.S. 598 (2000), successfully urging the U.S. Supreme Court to invalidate a provision in the Violence Against Women Act of 1994, § 40302, 108 Stat. 1941-1942, as beyond congressional authority. Eagle Forum ELDF has a strong interest in opposing overreach by the federal government's infringement on individual rights as presented here.

SUMMARY OF ARGUMENT

The government's Application unfortunately mischaracterizes the district court decision below, distorts the legal standard for review here, relies on speculation about foreign opinion, and ignores that the protection of First Amendment associative rights and Fourth Amendment privacy rights requires a nationwide injunction. The government exploits the shadow docket to seek an unwarranted presumption its favor. The government further misstates that the Corporate Transparency Act (CTA) is inapplicable to any tax-exempt political organizations (App. 7 n.1), when it does apply.

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

The CTA and its implementing regulation infringe on constitutionally protected associative activities, by creating a new federal power police power for monitoring, investigating, and potentially prosecuting 32.6 million Americans with a penalty of two years' incarceration. This Court has never sided with a broad federal police power before, and should not do so here. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549, 564 (1995) (rejecting "a general federal police power").

First Amendment associative rights are chilled and infringed by this sweeping new reporting requirement, as it burdens ordinary associations for political, religious, civic, and many other lawful purposes. As to the Fourth Amendment, clear precedents of this Court stand against this extensive infringement, including this Court banning a general police power to require identification. For those who seek to keep their home addresses private, FinCEN has gone further than the CTA by requiring disclosure of this and other highly personal information. *Compare* 31 C.F.R. § 1010.380(b)(1)(ii)(C) *with* 31 U.S.C. § 5336(b)(2)(A)(iii). The burdensome intrusion at issue here improperly deters many from volunteering to lead or perform management duties for local entities.

ARGUMENT

I. The District Court Found Irreparable Harm to First and Fourth Amendment Rights, which the Application Mischaracterizes and Waives any Objection to.

The district court's injunction expressly found that irreparable harm would occur if the CTA and its implementing regulation were to take full effect:

> [I]f Plaintiffs must comply with an unconstitutional law, the bell has been rung. Absent injunctive relief, come January 2, 2025, Plaintiffs would have disclosed the information they seek to keep private under the First and Fourth Amendments .... Independent of the specter of compliance costs on the horizon,

> Plaintiffs have met their burden to show the threat of irreparable harm because the CTA and Reporting Rule substantially threaten their constitutional rights.

(App. 49a-50a, relying on the First Amendment precedent in *Book People, Inc. v. Wong*, 91 F.4th 318, 340 (5th Cir. 2024)). When the district court later mentioned that it was unnecessary to reach First and Fourth Amendment issues, that was merely in the context of discussing the likelihood of success on the merits (App. 91a) and only after it had already found irreparable harm on these grounds.

Despite this clear holding by the district court, the government ignores it here and instead states that "the court found it unnecessary to address respondents' First and Fourth Amendment claims." (App. 7, citing App. 91a.) Yet implicit in the district court's finding of irreparable harm to First and Fourth Amendment rights is that plaintiffs have a substantial likelihood of prevailing on these claims. The district court also found that the CTA exceeded the enumerated powers of Congress, such that it was unnecessary to delve further into the individual rights at stake. The government fails to address – and thereby waives – this central issue of infringement on individual rights.

II. The Government Misstates the Legal Standard Here, and then Fails to Satisfy It.

The proper standard of review is set forth in Justice Brennan's chambers' opinion in the landmark *Rostker* v. *Goldberg* case, which the government cites but then failed to apply:

> [A] four-part showing [must be] made. First, it must be established that there is a "reasonable probability" that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. Second, the applicant must persuade me that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous. … Third, there must be a demonstration that irreparable harm is likely to result from the denial of a

> stay. And fourth, in a close case it may be appropriate to "balance the equities" – to explore the relative harms to applicant and respondent, as well as the interests of the public at large.

Rostker v. Goldberg, 448 U.S. 1306, 1308 (Brennan, J., in chambers, inner citations omitted).

The government's Application falls far short of its burden on these elements of the required standard, and instead misstates the standard as a "presumption of constitutionality" in favor of the government without ever addressing the elements in depth substantively. The government inexplicably relies heavily on dicta in *United States v. Morrison*, 529 U.S. 598 (2000) (cited by App. 11, 12), where this Court struck down a federal provision as unconstitutional: "Congress' effort in § 13981 to provide a federal civil remedy can be sustained neither under the Commerce Clause nor under § 5 of the Fourteenth Amendment." *Id.* at 627.

III. The CTA and Its Rule Violate the First Amendment.

Freedom of association as a First Amendment right is well-established by this Court, and was recently summarized and applied by the Second Circuit to rule in favor of pro-life groups and a Baptist church that asserted it. *See Compasscare v. Hochul*, Nos. 22-951-cv (L), 22-1076-cv, 2025 U.S. App. LEXIS 6, at *12-23 (2d Cir. Jan. 2, 2025) (Merriam, J.) The CTA and its Rule burden this right by requiring 32.6 million Americans to disclose with whom they associate, along with their personal information, to the federal government for law enforcement purposes, including investigation and prosecution. "Beneficial Ownership Information Reporting Requirements," 87 Fed. Reg. 59498 (Sept. 30, 2022) (codified at 31 C.F.R. pt. 1010) (the "Rule").

Judge Merriam explained as follows on behalf of the Second Circuit earlier this month: "The Supreme Court has made clear that the right to engage in activities protected by the First Amendment includes an implicit 'right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.'" *Compasscare v. Hochul*, 2025 U.S. App. LEXIS 6, at *12 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984)). Any chilling or other type of infringement on this right triggers application of strict scrutiny and a requirement that the law be narrowly tailored to legitimate ends. The CTA and its Rule completely fail this test.

The government misstates in its Application that "[t]he CTA's reporting requirements do not apply to tax-exempt political organizations." (App. 7 n.1, citing 31 U.S.C. § 5336(a)(11)(B)(xix)(II)). As the government's own cited provision expressly states, the political exemption applies only to a type of "political organization (as defined in section 527(e)(1) of such Code [26 USCS § 527(e)(1)]) that is exempt from tax under section 527(a) of such Code [26 USCS § 527(a)]." *Id.* Local political organizations formed to support or oppose ballot initiatives are an example of entities that do not qualify for this exemption. Yet this political organizing is a core First Amendment right, and the CTA and its Rule cannot possibly survive the exacting standard of strict scrutiny. The injunction below was expressly based on its finding of irreparable harm to First Amendment rights, which the government has not contested on appeal.

Associations have been a foundation of American prosperity and happiness since at least the days of Alexis de Tocqueville, who observed that "[i]n no country in the

world has the principle of association been more successfully used, or more unsparingly applied to a multitude of different objects, than in America." Alexis de Tocqueville, *Democracy in America*, Chapter XII (London: 1835).[2] Moreover, "'[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Roman Catholic Diocese v. Cuomo*, 592 U.S. 14, 19 (2020) (quoting *Elrod* v. *Burns*, 427 U. S. 347, 373 (1976) (plurality opinion)). If this Court stays the injunction, then 32.6 million Americans would suddenly be required to disclose their private, personal information to FinCEN, under threat of imprisonment of two years if they decline or fail to report. This constitutes an infringement on their core First Amendment rights.

In addition, the roughly 100 million Americans who cherish their Second Amendment rights are deterred by the CTA from associating locally, because a CTA reporting violation can cause a loss in Second Amendment rights. A frequently prosecuted statute is 18 U.S.C. § 922(g)(1), which renders gun possession unlawful by anyone convicted of a crime punishable by imprisonment for more than one year, as the CTA imposes. FinCEN, or merely a teenage computer hacker, could easily compare the CTA-generated database to the public information made available by each state about who are directors of small local organizations, and the millions of Americans who do not report to FinCEN would suddenly be exposed as criminals under the CTA. The burden of CTA compliance is not merely time and money,

[2] https://gutenberg.org/files/815/815-h/815-h.htm (viewed Jan. 5, 2025).

where are significant enough, but also the cost of being branded a criminal to be deprived of gun rights. Fewer would volunteer locally amid that risk.

IV. The CTA and Its Rule Violate the Fourth Amendment.

The CTA unjustifiably treats millions of Americans who are involved in beneficial local associations like a criminal suspect by requiring disclosure of highly personal information for the purpose of law enforcement, without any reasonable basis or a warrant. The Rule goes even further than the CTA requires, by compelling disclosure of home addresses to FinCEN. *Compare* 31 C.F.R. § 1010.380(b)(1)(ii)(C) *with* 31 U.S.C. § 5336(b)(2)(A)(iii).

This Court held in *Brown v. Texas* against allowing a generalized demand for identification, which is conceptually identical to the FinCEN requirement:

> Even assuming that [a valid] purpose is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it.

443 U.S. 47, 52 (1979). The CTA requires what *Brown* prohibits: a sweepingly broad demand for personal identification, for federal law enforcement purposes, of millions of Americans who have not done anything wrong.

In the current political climate of swatting and even the assassination of a private citizen, such as the United Healthcare CEO, having to disclose one's home address is a deterrent for millions of prominent, controversial or outspoken Americans as a condition of volunteering with local organizations. Even slight burdens can deter volunteer activities, just as even the slightest of poll taxes is unconstitutional. *See, e.g.*, 108 Cong. Rec. 17666 (1962) (daily ed. Aug. 27, 1962) ("While the amount of the poll tax

now required is small, there should not be any price tag or any kind of tax on the right to vote.") (statement Representative Edward Boland of Massachusetts about the 24th Amendment, as echoed by other congressmen).

The federal obligation for banks to report information about large cash transactions was upheld by this Court in an easily distinguishable decision. *Cal. Bankers Ass'n v. Shultz*, 416 U.S. 21 (1974). The obligation in *Shultz* was upheld against banks, not individuals, and was narrowly tailored to certain transactional information having a "high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." *Id.* at 26 (emphasis added). Moreover, in addition to three blistering dissents, the concurrence by Justice Powell in *Shultz*, as joined by Blackmun, stated their opposition to a broader reporting requirement:

> A significant extension of the regulations' reporting requirements, however, would pose substantial and difficult constitutional questions for me. … At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy. Moreover, the potential for abuse is particularly acute where, as here, the legislative scheme permits access to this information without invocation of the judicial process. In such instances, the important responsibility for balancing societal and individual interests is left to unreviewed executive discretion, rather than the scrutiny of a neutral magistrate.

Id. at 78-79 (Powell, J., concurring).

The CTA extends broadly and demands intrusive reporting obligations by ordinary law-abiding Americans about their local associative, sometimes political or religious, entities without any "high degree of usefulness" for any legitimate law enforcement by government, and without any protection by a neutral magistrate. As Justice Douglas dissented in *Shultz*, "Where fundamental personal rights are involved – as is true when as here the Government gets large access to one's beliefs, ideas, politics,

religion, cultural concerns, and the like – the Act should be 'narrowly drawn' to meet the precise evil." *Id.* at 85-86 (Douglas, J., dissenting, citation omitted). The CTA is not narrowly tailored as required.

No one would be surprised if the personal information gathered by FinCEN were hacked into and ultimately posted on the internet. As explained last week by the BBC:

> Chinese state-sponsored hackers broke into the US Treasury Department's systems earlier this month and were able to access employee workstations and some unclassified documents, American officials have said.
>
> The Treasury Department deemed the breach a "major incident" after disclosing it via a letter notifying lawmakers to the incident. …
>
> China denied any involvement, calling the accusation "baseless" and saying it "consistently opposes all forms of hacking."[3]

Promises of confidentiality in a government database, while the government pledges to share it widely as FinCEN will, are not reassuring.

V. The Government's Speculation about Foreign Opinions of the United States Does Not Justify the CTA and Its Rule.

Going beyond reliance on foreign law as a basis for decisions about the U.S. Constitution, which is widely criticized, the government speculates here about foreign opinions of the United States concerning the injunction as a reason for this Court to issue a stay. (App. 29) The government insists that "the injunction undermines the United States' credibility among other nations and impairs our ability to push other

[3] Nadine Yousif and Joe Tidy, "US Treasury says it was hacked by China in 'major incident,'" BBC (Dec. 31, 2024), https://www.bbc.com/news/articles/c3weye2j0e7o (viewed Jan. 5, 2025). China's adamant denial of the accusation is noteworthy; computer hackers frequently utilize foreign proxy IP addresses to mask their own geographic location, and it is unclear how the federal government could confidently know the true geographic origin of such a hack against the Treasury Department.

countries to reform their anti-money laundering and counterterrorism regimes." (*Id.*, inner quotations omitted)

Our constitutional rights do not properly hinge on speculation about how foreigners may perceive us, or on a desire to "push other countries" towards adopting certain policies for themselves. Other countries, like China as displayed in a map linked to by the government (App. 29a), do not recognize constitutional rights and thus it is unsurprising that other countries may impose centralized, even tyrannical, monitoring of associative conduct. Foreign countries lack the structure of federalism that the United States has. A goal of pushing other countries toward certain policies is not a justification for infringing on constitutional rights here. Something more – far more – than unfounded speculation about foreign opinions concerning the credibility of the United States is needed before infringing on constitutional rights domestically.

VI. The Boilerplate Invocation of "Money Laundering" and "Financing of Terrorism" Is Too Conclusory and Superficial to Warrant any Judicial Deference.

One of the worst-kept secrets in D.C. is to assert purported national security concerns, such as supposedly combatting terrorism, as a pretextual justification for vastly expanding federal prosecutorial power. As observed by the U.S. Court of Appeals for the Fourth Circuit:

> ***Of course***, courts must not uncritically defer to such national security claims. Otherwise, national security will become a talisman summoned by the government to avoid scrutiny of infringements of constitutional rights. … The very breadth of the term "national security" can make it an ***unduly tempting explanation*** for dubious actions that have little or ***no connection to national security at all***.

Elhady v. Kable, 993 F.3d 208, 228 (4th Cir. 2021) (emphasis added). Indeed, this Court rejected similar pretextual reasons by the House of Representatives for attempting to enforce a subpoena for Trump family banking records in *Trump v. Mazars USA*, 591 U.S. 848 (2020).

Yet the government here relies on boilerplate, conclusory assertions about "money laundering" (stated 18 times in the Application) and "terrorism" (8 times) that would not even survive a motion to dismiss under the permissive standard for evaluating allegations in a complaint. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) ("only a complaint that states a plausible claim for relief survives a motion to dismiss"). When the congressional justifications for a vast increase in federal power are no more substantive than what could have been written by Capitol Hill summer intern or generated by an AI program, then judicial deference is unwarranted to the superficial assertions.

The federal government has long had adequate, even powerful tools to track financial transfers that might constitute money laundering or the financing of terrorism, without unnecessarily burdening and infringing on the rights of 32.6 million law-abiding Americans. The existing Customer Due Diligence (CDD) regulation, 81 Fed. Reg. 29398 (May 11, 2016), requires those who process financial transactions to collect all the information the government legitimately needs: "With respect to the information that the CDD and the CTA collect about entities, the

information ***is generally the same, with minor variances***."[4] The CTA adds nothing beneficial, while infringing on constitutional rights.

The government's examples of possibly beneficial applications of the CTA to reduce crime are to Russian and Iranian nationals who could simply be prohibited by an executive order from setting up companies in the United States, or be tracked through the CDD. (App. 27) It is unjustified to burden, punish, and infringe on the constitutional rights of law-abiding millions of American citizens to address isolated foreigner misconduct.

VII. The Nationwide Scope of Plaintiffs' Proposed Injunction Is Proper.

The First Amendment freedom of association requires protecting the rights of others to associate with a plaintiff who asserts this right. A plaintiff cannot exercise his freedom to associate without others having the freedom to associate with him. Limiting the injunction to plaintiffs' rights to associate would be like ruling in favor an audience's right to applaud as long as they use only one of their hands to do so.

Plaintiffs are nationwide in geographic scope and membership, and thus the injunction to protect the First Amendment associative rights at stake here must be nationwide too. It is no remedy to protect the rights of nationwide plaintiffs to associate when no one else has an uninfringed right to associate with them. "The District Court did not abuse its discretion by granting nationwide relief. Given the nature of the Establishment Clause violation and the unique circumstances of this case, the

[4] Andres Fernandez, et al., "FinCEN Reference Guide Clarifies Beneficial Ownership Reporting Requirements," Holland & Knight Alert (July 31, 2024) https://tinyurl.com/yjdbnh2v (emphasis added, viewed Jan. 8, 2025).

imposition of a nationwide injunction was "necessary to provide complete relief to the plaintiffs." *Trump v. Hawaii*, 585 U.S. 667, 751 n.13 (2018) (Sotomayor, J., dissenting, inner quotation and citation omitted).

The government laments that foreigners are protected by the injunction, too, as though that presents a special risk. (App. 33) But the government is being disingenuous, as the Application does not seek relief of being allowed to impose the CTA and the Rule against foreigners specifically. (App. 39) Without requesting this specific relief, the government is making a strawman argument about enforceability against foreigners.

VIII. This Use of the Shadow Docket by the Government Should Be Rejected, as There Is No Emergency Here.

Faced with grave issues of infringement on First and Fourth Amendment rights awaiting orderly litigation and resolution below, the government is unjustified in rushing onto the shadow docket to insist on a preferential standard of review that would largely moot this lawsuit in its favor. There should never be a presumption in favor of infringing on First and Fourth Amendment rights. A procedural tactic to feign an emergency when there is none, in order to moot a constitutional dispute, should be criticized and rejected by this Court.

Delay is commonplace in implementing new, in this case unusual, government requirements, and its claim of urgency here is pretextual. For example, the REAL ID Act was enacted by Congress in 2005 in response to 9/11, to require more secure identification by air travelers. It was set to take effect in 2008, which was nearly 20 years ago. The federal government has repeatedly postponed its effective date such

that it is not currently scheduled to go into effect until May 7, 2025. *See* "Editorial: Real ID was supposed to make air travel safer 15 years ago. America is still waiting," *Chicago Tribune* (Jan. 4, 2023).[5] Given that the screening for terrorists on airplanes by requiring a secure ID is not an emergency, the government's attempt here to collect personal information before the constitutional issues can be litigated below is not a genuine emergency either.

CONCLUSION

The Application for a stay of the injunction should be denied.

Respectfully submitted,

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[5] https://www.chicagotribune.com/2023/01/04/editorial-real-id-was-supposed-to-make-air-travel-safer-15-years-ago-america-is-still-waiting/ (viewed Jan. 8, 2025).